United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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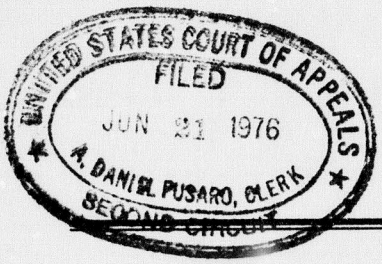

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United States Court of Appeals

FOR THE SECOND CIRCUIT

COASTAL STATES GAS CORP.,

Plaintiff-Appellant,

—against—

ATLANTIC TANKERS, LTD.,
ATLANTIC TANKERS, LTD.—MONROVIA,
ST. PAUL MARINE TRANSPORT CORP.,

Defendants-Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT COASTAL STATES GAS CORPORATION

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Issue Presented to this Court

Is a guarantor of a charterer to a contract of charter party released from its obligations when the obligee of the principal contract, the owner of the vessel, twice assigns his interest in the contract of charter to the obligor's (charterers) and guarantor's prejudice without ever obtaining the guarantor's consent.

Did the Court below err in answering this question negatively and subsequently (1) ordering the guarantor to arbitrate all issues with the owner and charterer and (2) staying this action pending completion of the arbitration?

Statement of the Case

Foreign Energy Tankers, Inc. (hereinafter FETI) chartered the vessel M.T. ST. PETER from its owners St. Paul Marine Transport Corp. (hereinafter St. Paul). Coastal States Gas Corporation (hereinafter Coastal) executed a so-called letter of guaranty addressed to St. Paul in which it agreed to assume and perform any duties owed by FETI *to St. Paul* if FETI defaulted in the fulfillment of these obligations.

St. Paul subsequently sold the vessel to Union Carriers Corporation—Monrovia (hereinafter Union Carriers) and by Addendum No. 1 dated April 15, 1974 to the charter party, simultaneously assigned to Union Carriers the contract of charter party with FETI. Coastal States did *NOT* consent to this assignment. Union Carriers sold the vessel to Atlantic Tankers Ltd.—Monrovia (hereinafter Atlantic) and by Addendum No. 2, dated August 25, 1975 simultaneously assigned to it the charter party with FETI. Again, Coastal States did *NOT* consent to the assignment.

Throughout the period of the charter, the ST. PETER's physical condition and mechanical performance deteriorated so drastically that Los Angeles Dept. of Water and Power, one of FETI's most prized customers finally instructed FETI never again to nominate the ST. PETER to carry petroleum to its facility. ST. PETER suffered repeated mechanical failures that led to extended periods in which she could not operate. The commercial purpose for which the ST. PETER was hired became frustrated. Consequently in October 1975 FETI repudiated the charter. Thereafter, on February 6, 1976 ST. PETER sank with the loss of its entire cargo.

Atlantic demanded arbitration with FETI. FETI agreed to submit all differences to arbitration and arbitrators were

appointed and a Panel constituted. Atlantic then demanded arbitration with Coastal. Coastal refuses to submit to arbitration.

Coastal's obligations as guarantor under the charter party were terminated by the assignments of the contract made without its consent. The assignments placed ownership of the ST. PETER and the concomitant duty to properly maintain and crew her in the hands of incompetent parties, as demonstrated by her sinking. These assignments increased Coastal's risk as guarantor without its consent and consequently Coastal was released from its obligations as guarantor.

The Lower Court ordered that Coastal States Gas Corporation is bound to arbitrate disputes with Foreign Energy Tankers, Inc. and Atlantic Tankers Ltd.—Monrovia. The Lower Court also ordered that this action be stayed pending arbitration.

Statement of Facts Relevant to the Issues

The Charter Party

This action was commenced to declare that Coastal States Gas Corporation is not bound to arbitrate any disputes with Atlantic Tankers Ltd.—Monrovia arising out of a Tanker Time Charter Party dated August 2, 1973 between Foreign Energy Tankers, Inc. as charterers and St. Paul Marine Transport Corp. as owners. After learning that Atlantic intended to nominate arbitrators on behalf of Coastal, Coastal moved for a preliminary injunction enjoining Atlantic from appointing arbitrators on behalf of Coastal and proceeding to arbitration.

The facts underlying this dispute are not in contention between the parties.

The Assignments

A dispute concerning FETI's repudiation of the above mentioned contract of charter party of the vessel ST. PETER is presently in arbitration. Plaintiff Coastal was not a party to the charter.

We understand that the ST. PETER was sold by St. Paul to Union Carriers and that by concurrent Addendum No. 1 to this charter party, dated April 15, 1974, St. Paul Marine Transport Corp., assigned all of its rights, duties and obligations under the charter party to Union Carriers Corporation—Monrovia. Plaintiff, Coastal, was never a party to this transfer. Plaintiff never consented to or acquiesced in this transfer.

We understand that concurrently with a second sale of the ST. PETER and by Addendum No. 2 of the charter party, dated August 25, 1975, all rights, duties and obligations of the then owner were transferred to defendant, Atlantic Tankers, Ltd.—Monrovia. Again, plaintiff, Coastal, was at no time a party to nor did it agree or consent to this transfer.

The Guaranty

After the charter party was executed but *BEFORE* the above-described addenda were incorporated, H. D. Moore, Senior Vice-President of Coastal States Gas Corporation, wrote a so-called letter of guaranty *to St. Paul Marine Transport Corp.* This letter required that if FETI *defaulted* in its obligations *to St. Paul Marine Transport,* Coastal would require FETI to transfer the charter to it (Coastal) and Coastal would perform the remainder of the contract.

Clause 55 of the charter party, requires that any and all differences and disputes between the owner and charterer be put to arbitration in New York before a panel of three arbitrators, one appointed by the owner, one by the charterer and the Chairman by the two so chosen.

ST. PETER's Deteriorating Condition

The ST. PETER experienced mechanical problems throughout the period of the charter. As the charter progressed and as the vessel was sold from St. Paul to Union Carriers and then to Atlantic, crew changes were made and apparently different vessel maintenance practices were established. Due to some combination of these factors, the ST. PETER's breakdowns became more frequent and more severe. In the Fall of 1975 discharge of the cargo holds which should have taken 24 hours required 10 days. This created serious delays and bottlenecks for one of FETI's largest customers. That client asked that the ST. PETER never again be brought to its docks.

As the mechanical failures multiplied the vessel was taken offhire for extended periods of time. Throughout each period in which the M/T ST. PETER was offhire she was laid-up. Consequently, she could not perform any of the services for which Foreign Energy Tankers, Inc. had contracted. The commercial venture for which the M/T ST. PETER was chartered became frustrated.

After repeated instances in which the M/T ST. PETER was offhire it became apparent that the M/T ST. PETER was utterly incapable of ever performing her contracted services. The commercial purpose for which she had been chartered was not fulfilled. Subsequently, as if to prove that her commercial value was at an end, she sank on February 6, 1976.

Based upon the above facts, charterer, Foreign Energy Tanker's, Inc., in October, 1975 repudiated the contract of charter party as being commercially frustrated and impracticable.

Atlantic's Demands

Atlantic Tankers, Inc. demanded arbitration with Foreign Energy Tankers, Inc., pursuant to Clause 55 of the charter party. Atlantic Tankers, Inc. and Foreign Energy Tankers, Inc. have each appointed an arbitrator. These two arbitrators have appointed a third arbitrator as chairman.

Atlantic Tankers, Inc., by letter of January 2, 1976 demanded arbitration with plaintiff, Coastal States Gas Corporation, on this very same matter despite the fact of FETI's going forward to arbitration. This demand for arbitration rests solely upon the so-called letter of guaranty of September 14, 1973. Coastal States Gas Corporation is not a party to the charter party and has been discharged from all obligations as guarantor because of the substantial unconsented to changes in the principal contract.

Present Status of the Arbitration

Pursuant to the order of the Lower Court, Coastal has nominated an arbitrator. The three arbitrators nominated by the parties have chosen two others to complete a panel of five.

Coastal has requested that the panel not sit in formal session to hear the merits of this matter until this appeal has been determined. Atlantic has contested this request. Thus far, the panel has not heard any part of this case. Depositions have, however, been taken by Atlantic, presumably in order to preserve the deponents' testimony.

The letter of guaranty in question is not binding amongst these parties nor can it require plaintiff, Coastal States Gas Corporation to submit to arbitration in this matter.

For these reasons, it is respectfully submitted that defendants be enjoined from naming arbitrators, and submitting this dispute to arbitration, and that it be held that Coastal has been released from the guaranty to the first owner of the vessel.

POINT I

Coastal may appeal from the final order of the court below.

Coastal States Gas Corporation may appeal to this Court from the final order and determination of Judge Wyatt in the Court below.

In *Compania Espanola De Petroleos, S. A.* v. *Nereus Shipping, S. A.*, 527 F2d 966 (2d Cir., 1975), this Court affirmed the Lower Court decision that the guarantor of the charterer's performance under a charter party that called for arbitration between the owner and the charterer must submit to consolidated arbitration with the owner and charterer. The Court also held that:

> "Inasmuch as the order (compelling arbitration) is conclusive on the issue of the obligation of the parties to arbitrate and how they are to arbitrate, and has a final and irreparable effect on the rights of the parties, it is appealable." *Id.* at 973 (explanation added)

The case at bar is similar on the particular issue of the finality of the Lower Court's order.

In *N. V. Maatschappij Voor Industriele Waarden* v. *A. O. Smith Corporation* (2d Cir., decided April 1, 1976, Nos.

618, 681 Slip Op. page 2905), the Lower Court directed that the parties arbitrate disputes arising out of a patent license and know-how agreement. Furthermore, it stayed further proceedings in the Lower Court pending completion of the arbitration. This Court held that the Lower Court's order that the parties arbitrate the controversy was appealable because it "constituted a final judgment in an independent proceeding commenced by a petition to compel arbitration." *Id.* at 2908. This Court also held that the order staying the action pending arbitration was appealable.

The case at bar presents an identical determination of the Lower Court to this Court. Consequently, both on the basis of the *Nereus* and *Maatschappij* cases, Coastal has the right to appeal to this Court from the decision compelling arbitration and simultaneously staying the action pending the determination of the arbitration.

POINT II

A guarantor will be discharged from his obligation when the principal contract he has guaranteed has been altered without his consent.

The law is clearly established that the obligation of a voluntary surety/guarantor will be discharged when the principal obligation that is guaranteed has been altered or modified without consent of the surety. In fact, Atlantic has agreed at page 14 of its Memorandum in Opposition to Coastal's Motion for Preliminary Injunction that "[w]e agree with Coastal that where a transfer or assignment *alters the substance of the guarantor's obligation,* the guarantor (absent his consent) is discharged."

Any change in the principal contract releases the guarantor

In *Chapman* v. *Hoage,* 296 U.S. 526, 56 S.Ct. 333, 80 L.Ed. 370 (1935), the question arose whether an employer and its insurance carrier were released from their obligations to an insured injured employee after the employee had discontinued his action against the responsible third party. This denied the employer and insurance carrier their right to subrogation because the statute of limitations had expired prior to the discontinuance. The Court applied the rule that:

> "It is generally true that the obligation of a voluntary surety is so far regarded as *strictissimi juris* as to be released upon a showing, without more, that the principal obligation has been modified or surrendered without the consent of the surety. *Spring* v. *Bank of Mt. Pleasant,* 14 Pet. 201; *Wood* v. *Steele,* 6 Wall. 80; *Porto Rico* v. *Title Guaranty & Surety Co.,* 227 U.S. 382; *Edwards* v. *Goode,* 228 Fed. 664; *United States Fidelity & Casualty Co.* v. *Pensacola,* 263 Fed. 344." *Id.* at 530.

It then went on to hold that since under these facts the insurer's and employer's right of subrogation was not impaired the guarantor should not be discharged.

In *Reese* v. *United States,* 76 U.S. 13, 19 L.Ed. 541 (1869) a bail bond was obtained for the defendant upon the condition that he appear personally at each term of the Court. The case was postponed upon stipulation such that the defendant would only appear at hearings to consider his case. The Court held that the sureties were discharged because the stipulation altered the character of the principal obligation.

> "Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking." *Id.* at 21.

The Court also held that the creditor (in this instance the government as prosecutor of the accused) may not "take any proceedings with the principal (the accused) which will increase the risks of the sureties or affect their remedy against him." 76 U.S. 13, 22 (1869) (explanation added).

Becker v. *Faber,* 280 N.Y. 146, 19 N.E.2d 997, 10 N.Y.S. 2d (1939) was an action to foreclose upon a mortgage guaranteed by one Kolle. The principal debtor and creditor subsequently extended the period in which to repay the mortgage and lowered the interest rate without the guarantor's consent. While the Court held that the guarantor (specifically, his executor) was not discharged because the contractual alteration did not place him under a greater obligation, the converse of the holding is critical. If the alteration had increased the surety's risk he would have been discharged.

The Court integrated this rationale into a restatement of *strictissimi juris* at 148-149.

> "A contractual obligation may not be altered without the consent of the person who has assumed the obli-

gation. The obligation of a surety or guarantor of due performance of a contract cannot be extended, without the surety's consent, to cover performance of a different contract. Alteration of the contractual obligation of the principal releases the surety, for the principal is no longer bound to perform the obligation guaranteed by the surety and the surety cannot be held responsible for the failure of the principal to perform any other obligation. The rule is based upon fundamental principles of contract which have not been seriously challenged in any jurisdiction, though there is difference of opinion in regard to the proper application of the rule."

The scope of "any change in the contract"

The dispute between these parties focuses upon the precise scope and definition of the phrase "any change in the contract" referred to by the Supreme Court in *Reese, supra* and "alteration" as used by Judge Lehman in *Becker, supra.* Coastal States submits that the phrase is to be construed rigidly. The words should be given their natural and usual meaning. The theory and rationale underlying the doctrine of *strictissimi juris* and discharge of the surety should be the only factors used in interpreting "any change" and "alteration."

Professors Williston and Corbin have written extensively on the theory behind these doctrines. Professor Williston at 10 *Williston on Contracts,* Third Edition §1225, a section on grant of an extension of time to the guarantor, says that if the acts of the principal debtor or creditor result in any of the following, the surety/guarantor will be discharged.

1. An increase in the surety's risk

2. An increase in the chance that the principal debtor will default and a decrease in his ability to reimburse or exonerate the surety or

3. An impairment of the right of subrogation

Professor Corbin said at 3A *Corbin on Contracts* §732, 424 that "[t]he result (discharge of the surety) is not necessarily based upon the non-performance of a return promise, but whenever the non-performance of such a return promise by the creditor will materially increase the promisor's risk of having to perform, the surety will be discharged by reason of the non-performance of a constructive condition precedent."

Proper application of Professors Williston and Corbin's statements to the rules generated by the Court leads to the ineluctable conclusion that assignment of the contract of charter for the M/T ST. PETER without the guarantor's express approval discharged the guarantor. The assignment was certainly to paraphrase *Reese,* a change in the contract, made by the principal parties without the surety's consent. As described below, it increased the chance that the principal debtor would default and therefore increased the surety's risk and impaired its right of subrogation.

Coastal States is released from its letter of guaranty

Coastal States' so-called letter of guaranty dated September 14, 1973 agreed that "[i]n the event that Foreign Energy Tankers, Inc. defaults under any of the obligations and duties owed by it *to St. Paul Marine Transportation Corp.* . . . (it) will hereby assume and perform such duties." Coastal States made a guaranty to St. Paul Marine Transportation Corporation. It did not make a

guaranty to either Union Carriers or Atlantic Tankers. Coastal knew that St. Paul would tender and maintain a commercially valuable, staunch and seaworthy vessel. Therefore, Coastal guaranteed the contract.

Union Carriers and then Atlantic Tankers did not provide the maintenance and repair services for the M/T ST. PETER which FETI had contracted for St. Paul Marine Transport to provide. This was in breach of the contract as assigned which still called for the maintenance. In fact, the maintenance was so deficient that M/T ST. PETER continually broke down and so frustrated the commercial venture underlying the contract of charter party that its performance became impossible. Atlantic Tanker's maintenance record and the performance of the M/T ST. PETER finally deteriorated so drastically that the vessel caught fire, burned out of control for days and then sank with the total loss of its cargo.

We point out Union Carrier's and Atlantic Tanker's inadequate maintenance of the ST. PETER and her unfortunate yet very avoidable demise in order to illustrate how drastically assignment of the charter party altered FETI's obligations and increased Coastal's risks. Prior to the assignment, Coastal had to guarantee payment of charter hire for a sound vessel. After the assignment Coastal became liable to pay, if Foreign Energy Tankers did not, for a vessel that was not in the superior condition she had been while St. Paul owned her. Her steadily deteriorating condition increased the probability that Foreign Energy Tankers Inc. would reject her (as happened) and subject Coastal to liability. This naturally increased Coastal's risk.

These effects of the assignment are precisely those that Professors Williston and Corbin have described as the underlying rationale for release of the guarantor. Fur-

thermore, they increased the risk of the surety which *Reese* held released the surety. The guarantor has been prejudicially effected without his consent through alteration and change of the principal contract.

We note that Union Carriers has tacitly agreed that Coastal is released from its guarantee. Union has not made any demand whatsoever against Coastal. It is only the second assignee, Atlantic Tankers, who has attempted to pursue a claim against the guarantor.

The guarantor is released when the principal contract is assigned

Careful examination of the case law reveals that in all those instances in which there has been an assignment of the principal debt by the principal obligee or creditor *and* one of the three criteria proposed by Professor Williston has been met the guarantor has been released. In such a situation, the guarantor is prejudicially effected by the combination of events. However, mere assignment of the principal debt without the additional occurrence of one of Professor Williston's criteria would not produce a detrimental or prejudicial effect on the guarantor. Therefore he would not be released.

Standard Sewing Machine Co. v. *Smith,* 51 Mont. 245, 152 P. 38 (1915) was a case in which Mr. Smith contracted with Standard Sewing Machine Company (of Colorado) to sell its machines. Pursuant to the contract he could either accept cash or checks for the sales he made provided that he personally endorsed all the checks. Furthermore, a "security bond" was executed by the respondents running to the company guaranteeing Smith's performance. Standard of Colorado, the principal obligee, then assigned the bond and contract to Standard of Ohio. Smith failed to make payments to Standard of Ohio. Consequently the

action was initiated. The Court held that the sureties were released. The Court said that:

> "The sureties did not agree to answer to any one save the Colorado company, and then only for such claims as it might have for Smith's failures under the contract. From that company Smith received nothing; to it he owed nothing. It is familiar law that engagements of suretyship are *strictissimi juris;* the sureties are entitled to stand upon the exact letter of their bond; they cannot be charged beyond its terms, and their engagement, when by its nature or language it is addressed to a particular party, can be acted on and enforced by that party alone." *Id.* at 249.

In *Union Properties* v. *Bogdanoff*, 250 A.D. 282, 294 N.Y.S. 151 (1st Dept., 1937) the Court held that the guarantor (Bogdanoff) was released from his contract of guaranty when the obligee (creditor) assigned the principal debt. See generally *Northern Minnesota Drainage Co.* v. *Equitable Surety Co.*, 131 Minn. 243, 154 N.W. 1092 (1915); *Lumberman's Bank & Trust Co.* v. *Sevier*, 149 Wash. 118, 270 P.291 (1928); *Brill* v. *Friedhoff*, 102 Misc. 565, 169 N.Y.S. 193 (Sup. Ct., 1918) for similar determinations.

Stearns, *The Law of Suretyship*, §6.5 (5th Ed., 1951) has specifically said that:

> "Following the rule that a surety is not liable where a new contract has been substituted for the original principal contract, most courts have held that the addition of a new party constitutes such a material alteration as will discharge the surety or guarantor." * * *
>
> "Just as the addition of a new party to the contract normally discharges the surety, the *substitution* of a new party in place of one of those originally contract-

> ing, as by an original party *assigning* his interest in the contract to another in whole or in part, will have the same effect." *Id.* at 113-114 (emphasis added)

Assignment of the contract by the principal obligee (creditor) releases the guarantor.

New York real property cases exist in which it was held that an assignment of the bond and mortgage by the obligee (creditor) did not release the guarantor of the bond. These are distinguishable from the case at bar. When the obligee (creditor) assigns his interest in a bond and mortgage it does not alter the obligor's (principal debtor) position nor prejudice the debtor. So long as the creditor maintains the consideration he has contracted for (loan of the mortgage monies) the debtor is really in no different position having to repay the monies to an alternate party. If the debtor's position is unchanged the surety will not become subject to the three (3) prejudices outlined by Professor Williston, *supra.*

In the case at bar, assignment of the contract significantly altered the position of the obligor—FETI. FETI had to pay charter hire to a different party. That was not a significant alteration itself. However the return consideration of the obligee (vessel owner) underwent a severe change. The owner's duty and contractual obligation was to provide an operable and seaworthy vessel. As discussed above, Coastal's reliance on St. Paul's personal ability to perform these services for the M/T ST. PETER led Coastal to guarantee the contract. Atlantic, and Union Carriers who has tacitly agreed that Coastal is released, failed to properly maintain the vessel. Therefore she sank. These failures by Atlantic altered the principal contract and changed the consideration flowing to FETI to such a

degree that the three factors set forth by Professor Williston came into play causing great risk to the guarantor.

The alteration of the contract by the assignment combined with the prejudice to the guarantor that resulted from FETI's changed position released Coastal as Guarantor. The case is in point with *Standard Sewing Machine.*

POINT III

The contract between St. Paul Marine Transportation Corp. and Foreign Energy Tankers, Inc. called for performance of a personal obligation.

A contract that requires personal performance may not be assigned. "If the duty does require personal performance it cannot be discharged by any performance by another even though it could serve the purpose as well or better than the performance of the one who contracted to render it." 3 *Williston on Contracts,* Third Edition, §411, 20-21.

In *Arkansas Valley Smelting Co.* v. *Belden Mining Co.,* 127 U.S. 379, 8 S. Ct. 1308, 32 L.Ed. 246 (1887) the parties entered into a contract for the defendant to deliver ore to Billings and Eilers. The price for the ore would not be fixed until each 100 ton lot had been assayed. In the interim, between delivery and the assay, the defendant's sole security was the knowledge of Billings and Eiler's character and solvency. Eiler's transferred his interest to Billings who in turn assigned the entire interest to the plaintiff, a stranger. The defendant refused to deal with this stranger to the contract. The Court held that the contract was personal and not assignable and that the defendant was under no obligation to deal with the stranger.

> "Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a

> relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." *Id.* at 388.

Paige v. *Faure,* 229 N.Y. 114, 127 N.E. 898 (1920) held that one partner could not assign his interest in a contract to the other partner where both partners had contracted to sell the defendant's tires. The contract was personal and not assignable. Both partners were to devote their full efforts to sales on behalf of the defendant.

In *Moore* v. *Thompson,* 93 Mo. App. 336, 67 S.W. 680 (1902) a corporation rented space to the plaintiff for it to use as a shoe store. The corporate landlord went bankrupt and assigned its assets, including the plaintiff's lease, to a trustee for the benefit of creditors. In an action by the tenant for access to his leasehold and stock the court held that:

> "[t]he contract sued on was not assignable without the assent of both parties thereto for the reason that it was one of mutual confidence and for the performance of valuable services each for the other." *Id.* at 347.

Standard Sewing Machine Co. v. *Smith,* 51 Mont. 245, 152 P. 38 (1915) was discussed *supra* for its holding that the guarantor was released because of the obligee's assignment of the principal contract between the obligor and obligee. The Court also held that the contract between Smith and the Standard Sewing Machine Co. (of Colorado) contained rights coupled with liabilities, that it was for personal service and that it involved a relation of personal confidence. Hence it was held to be unassignable. Since the contract was unassignable neither the debtor nor the guarantor had any liability under its terms.

The Second Circuit had recent occasion to examine this doctrine in *Arnold Productions, Inc.* v. *Favorite Films Corp.*, 298 F.2d 540 (2d Cir., 1962). Even though the Court ultimately held that the contract was not personal and therefore was assignable it is firm proof that the doctrine is viable in this Circuit.

The contract of character party that is presently in dispute is also personal in nature. FETI contracted with St. Paul Marine Transportation Corp. for St. Paul to provide a well-maintained and commercially useful vessel. St. Paul fulfilled this obligation fairly adequately. The vessel was transferred to Union Carriers who let the vessel fall into disrepair and suffer numerous mechanical breakdowns, even though Union Carriers was under the same contractual obligations that St. Paul had been under. The M/T ST. PETER was then transferred to Atlantic who provided such an incompetent crew and insufficient maintenance that she sank. Only St. Paul Marine provided the services which the ST. PETER required in order to remain a valuable vessel.

Applewhaite v. *S. S. Sunprincess,* 136 F. Supp. 769 (D.N.J., 1956) was a case in which the representatives of deceased seamen attempted to attach the vessel to secure claims against a charterer. The Court vacated the attachment holding that:

> "The very nature of a charter agreement is a manifestation of the intent of the parties that it shall not be assignable. The relationship between the parties to the charter indicates (to paraphrase the familiar expression of Lord Denman) the existence of the right to the benefit anticipated from the character, credit, and substance of the party with whom the contract is made. *Humble* v. *Hunter,* 12 Q.B. 310, 317. 'Rights arising

> out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' (Pollock on Contracts, 4th Ed. 425). Approval is specifically given to these pronouncements in *Arkansas Valley Smelting Co.* v. *Belden Min. Co.*, 127 U.S. 379 at pages 387, 388, 8 S. Ct. 1308, 32 L.Ed.246." *Id.* at 771.

A contract of charter party is clearly a personal, unassignable contract.

FETI contracted with St. Paul Marine and Coastal guaranteed FETI's obligation to St. Paul Marine because FETI knew St. Paul could and would provide the necessary services to the chartered vessel. The principal contract as well as the guarantee were personal contracts executed in consideration of St. Paul's personal qualifications. The assignment was therefore ineffective and a nullity as against any party to the contract that did not expressly consent to the assignment.

Standard Sewing Machine, supra, held that any assignment that was ineffective against a party to the principal contract was also ineffective against a surety of that contract. Therefore, since Coastal did not expressly consent to assignment of the personal contract of charter party it was ineffective against it as guarantor.

CONCLUSION

The Final Order of the District Court should be reversed. Coastal States Gas Corporation has been released from its duties as guarantor. Coastal States Gas Corporation is not

bound to arbitrate disputes between Foreign Energy Tankers, Inc. and Atlantic Tankers Ltd.—Monrovia.

Respectfully submitted,

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GOLDNER PRESS, INC. LAW AND FINANCIAL PRINTERS WO 6-5525